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No. 79-512

In the Supreme Court

OF THE

United States

OCTOBER TERM 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

vs.

LAURO DE LOS SANTOS AND SEATTLE STEVEDORE CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

The question presented is whether a shipowner's duty of care to longshoremen under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. section 905(b) requires it to supervise the work of an expert independent stevedore contractor so closely as to be in a position to countermand the stevedore contractor's informed decision regarding the safety of work methods and equipment.

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BRIEF OF PETITIONER

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States District Court for the Western District of Washington is not officially reported but is reported at 1976 A.M.C. 2583 and is set forth in Appendix A to the Petition for Certiorari. The district court's judgment is set forth in the Joint Appendix at p. 24. The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at 598 F.2d 480 and is set forth in Appendix B to the Petition for Certiorari. The judgment of the Court of Appeals is set forth in the Joint Appendix at p. 25. The order of the Court of Appeals denying the petition for rehearing is not reported but is set forth in Appendix C to the Petition for Certiorari.

JURISDICTION

On May 1, 1979, the Court of Appeals entered its judgment reversing the decision of the district court granting the petitioner's summary judgment motion. A petition for rehearing was timely filed May 15, 1979, and was denied June 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). This Court granted certiorari May 12, 1980.

STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. section 905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was

caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

On December 10, 1972 (A. 10),[1] just two weeks after the effective date of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972,[2] Seattle Stevedore Company was engaged as an independent contractor loading a cargo of bagged wheat aboard the M/S JALARATNA, owned by Petitioner, Scindia Steam Navigation Co., Ltd. (A. 10-11). One of Seattle Stevedore Company's employees was plaintiff and Respondent Lauro De Los Santos (A. 11). Santos and other employees had been loading the wheat from 7:00 p.m. to 8:45 p.m. that evening (A. 11). It must be taken as true on defendant's summary judgment motion that Seattle Stevedore Company had also been loading the cargo for two days before (Plaintiff's Memorandum of Authorities, p. 2, R. 119). It is stipulated that as an independent contractor, Seattle Stevedore Company was in control of the loading operations (A. 11).

Shortly before Santos was injured, a pallet load of sacks of wheat being brought into the ship by a winch

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[1]"A." refers to the Joint Appendix; "Pet. App." means an appendix to the Petition for Certiorari; "Appendices I, II and III" refer to the compilations of state cases and Restatement sections following this brief; and "R." refers to the clerk's Transcript in the Court of Appeals in which the pages are consecutively numbered.

[2]Pub. L. No. 92-576, 86 Stat. 1251 (1972).

operated by another employee of the same stevedore company landed badly and some of the sacks of wheat spilled on the deck where Santos was working (A. 11). The hatch tender who was supervising the operation directed the winch driver to raise the pallet load containing the remaining disarranged sacks about fifteen feet up, while Santos and another longshoreman went under it to clean up the spilled sacks (A. 11). About ten minutes later when more sacks fell from the suspended load, some of them hit Santos, injuring him (A. 11).

Santos filed suit in the United States District Court for the Western District of Washington (A. 1, 3). After entry of the pretrial order, Scindia moved for summary judgment (A. 1), since plaintiff had not asserted in the pretrial order that the shipowner played any part in operating the winch, raising the load, leaving it suspended over the hold, or causing the plaintiff to work under it (A. 14-15). In reply plaintiff did not allege that Scindia had played any active role in the accident, and merely pointed to deposition testimony which showed that the stevedore company's winch operator claimed to have encountered difficulty controlling the winch for two days prior to the accident. The brake which controlled the descent of the load of cargo was said to have failed to stop the load immediately when the mechanism was put in the stop position and to have permitted the load to creep down after it was suspended over the work area.[3] This difficulty was claimed to be the cause of both the spillage of the sacks in the first place and the later falling of the sacks on Santos (Plaintiff's Memorandum of Authorities, pp. 1-2, R. 118-19).

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[3]Scindia does not concede that the electric winch malfunctioned as described. Indeed it does not admit credence to such a view, because of the inherent implausibility that a brake malfunction on such a winch would produce the behavior described. But the plaintiff's allegations, although implausible, must be assumed to be true here.

Plaintiff argued that, if the jury believed this testimony, the shipowner ought to be chargeable with knowledge of the problem with the winch in time to have corrected it (*Id.* at 9-10, R. 126-27). The trial court rejected this contention and granted summary judgment, basing its decision on the obviousness of the condition, the control exercised by the stevedore company and the extreme danger inherent in the decision to work under the suspended but unsteady load. Pet. App., pp. A-4 to A-6.

The Court of Appeals reversed, announcing a standard that imposed a duty on the shipowner to supervise the stevedore company and to protect longshoremen notwithstanding the obviousness of the condition and the stevedore's control.

> We adopt the following standard of negligence for purposes of 33 U.S.C. § 905(b) actions:
>
> A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner
>
> (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and
>
> (b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger. [Pet. App., p. B-11, 598 F.2d at 485.]

The Court of Appeals also charged the trial court with four specifications of resolving factual issues on a summary judgment motion:

1. The trial court had noted the failure of plaintiff to contend that the shipowner had actual knowledge and then added the holding that the shipowner could not be charged with constructive knowledge since the shipowner

did not have a duty to know, in light of the stevedore's stipulated control. Pet. App., pp. A-4, A-5. This parenthetical notation that the shipowner had neither actual nor constructive knowledge of the defect in the winch was said by the Court of Appeals to be a finding. Pet. App., pp. B-18, B-19, 598 F.2d at 489.

2. The Court of Appeals decided that the trial court had erred in describing the stevedore company's control, which was admitted in the pretrial order, as "exclusive control of the gear and the premises", since only the shipowner had the power to repair the winch. Pet. App., pp. B-20 to B-22, 598 F.2d at 490. The trial court, however, was referring to the operation of the winch and had never reached the question whether the shipowner had a duty to repair the winch, since it determined that it had no duty to learn of the condition.

3. The trial court had accepted Santos' view at the outset of its discussion when it recited that he alleged the winch was defective when it "was lowering pallets loaded with sacks of bulgar wheat" and "this defective winch proximately caused the plaintiff's injuries." Pet. App., p. A-3. The Court of Appeals, however, stated that the trial court had erred in saying that the first spillage of sacks had been "caused by the pallet striking the pallet jack" and in failing to take account of Santos' "broader view that the defective braking mechanism caused the initial spillage". Pet. App., p. B-22, 598 F.2d at 490.

4. The Court of Appeals charged the trial court with "emphasizing" that the pallet was swinging and ignoring Santos' claim that it was the creeping of the winch as a result of the slipping brake which caused the sacks to fall on him. The trial court opinion does not disclose the origin of this view, as it shows no sign of doubting that plaintiff might prove that a defect in the winch caused his injury.

SUMMARY OF ARGUMENT

I. Generally applicable principles of land-based negligence law determine the scope of a shipowner's duty to longshoremen under the 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), which abolished the longshoremen's cause of action for unseaworthiness and retained a cause of action for negligence, since Congress directed the courts to apply such principles and the prior decisions of this Court declare them to be controlling. Those principles are expressed in a case Congress referred to in the legislative history, in the law of most states, in the Restatement (Second) of Torts, and in Supreme Court cases before 1972. They establish that a shipowner is not required to supervise an independent expert stevedore contractor; that the shipowner's duty extends to warning of concealed dangers which are not known nor obvious to the stevedore contractor, but which are known or should be known in the exercise of reasonable care to the shipowner; that the shipowner's own actions and any exercise of control over the details of the stevedore's activities must be reasonable under the circumstances; and that the shipowner must take reasonable care of areas or equipment over which it retains control. The result below is based on entirely different principles which require the shipowner to supervise the stevedore contractor and which impose liability for injuries caused by obvious conditions known to the stevedore company.

II. The rule below frustrates three important policies of the act. First, it does not promote safety, for if the prior decision of this Court in *Pope & Talbot v. Hawn*, 346 U.S. 406, permitting a negligent stevedore to recover its lien, is still law, the third-party action relieves the stevedore of expense for the accident. The rule below allows such reimbursement even when the stevedore was in a better position to have avoided the accident than the shipowner. Re-

moving the burden from the party in the better position to avoid accidents causes a reduction in the safety incentive which probably more than offsets any increase in that incentive because of the third-party action, especially since any increase in the total incentive resulting from the tort action is doubtful. Second, the rule below is inimical to the principles of security and reasonable attorneys' fees. The third-party action has no demonstrable effect other than to produce an immediate lump sum award of future compensation, less an unregulated fee, instead of the permanent monthly payments and controlled fees the statute provides. Third, the result below permits courts and juries to impose liability for minimal, passive fault, when such imposition is unfair because the statute and case law prohibit contribution and indemnity and the collateral source rule may bar proof of plaintiff's receipt of compensation and of his employer's stake in the judgment.

III. A-C. The decision below was based on erroneous legal analysis. The court saw its job as fashioning a new standard, while actually Congress directed courts to apply existing rules. The court below rejected a score of court of appeals decisions and relied instead on an already reversed district court decision and the grease spot illustration from the legislative history, which explains the unseaworthiness remedy Congress abolished, but does not provide any insight into the rules for negligence actions. The court failed to consider the absence of support for the rules it applied in the great body of state law.

III. D-E. The decision below confuses the elements of a tort action and merges "duty" into "standard of care" to produce "standard of negligence". Such an approach ignores the general rule that one must have a duty to act before one can be said to have carelessly failed to act and thus fails to recognize the need for rules about duty. By overlooking the role of "duty" in negligence analysis, the court also confused assumption of risk and contributory negligence (not defenses under the statute) with duty. The

court misunderstood the holding of *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, to be inconsistent with rules about duty, but *Kermarec* was decided at a time when this Court understood and applied those rules and this Court has since cited *Kermarec* and the very rules rejected below in the same breath in *Federal Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404.

III. F. The decision below is based on a view that longshoremen face trouble for stopping work in the face of dangerous conditions, a view discredited by the recent decision of this Court in *Whirlpool Corp. v. Marshall,* 48 U.S.L.W. 4189 (February 26, 1980) (No. 78-1870). The court below also ignored the stevedore company's well established power and duty to stop work and compel correction of dangerous conditions at the expense of the shipowner.

IV. The standard below, because it submerges the crucial considerations of obviousness and control by the stevedore into a general inquiry into all the circumstances, will require disposition by trial of vast numbers of cases brought instead of relying on the compensation remedy, where the shipowner's involvement has been only to fail to prevent the stevedore contractor from doing what it knowingly chose to do to deal with known dangers. The decision below has been seized upon by courts and augmented by misreadings of the decision in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 to produce heretofore unthinkable results, including: declarations that the stevedore company's fault and control are irrelevant; application of the OSHA regulations as evidence of negligence of the shipowner (who is not the "employer" against whom alone the regulations apply); and finally re-elevation of the longshoreman to the status of merchant seaman as a beneficiary of the special Jones Act causation rule and the person in whose favor all doubts must be resolved.

V. While the Court of Appeals' decision was incorrect, the trial court's grant of summary judgment was not. The district court relied on sections 343 and 343A of the Restatement (Second) of Torts and on the fact that it was inconceivable that a stevedore company would permit its employees to work under a disarranged load of sacks suspended from a winch known, or thought, to be slipping, and found that the shipowner was not negligent and any problem with the winch was not a proximate cause of the injury. This decision was correct under the principles the court applied, under those the Petitioner urges here, and under a remarkably similar 1962 Ninth Circuit decision. The trial court did not resolve material issues of fact; it assumed facts as plaintiff would have them and held that the inferences plaintiff urged were immaterial.

ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH GENERAL AND LAND-BASED PRINCIPLES OF TORT LAW WHICH CONGRESS DIRECTED THE COURTS TO APPLY

A. Congress Directed the Courts to Apply Generally Prevailing and Land-Based Tort Principles

When Congress enacted the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, abolishing longshoremen's unseaworthiness claims and prescribing only a cause of action for negligence, Congress directed the courts to apply accepted and land-based principles of negligence law.

> [D]isputes as to whether the vessel was negligent in a particular case . . . can only be resolved through the application of accepted principles of tort law . . . .[4]

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[4]S. Rep. No. 92-1125, 92d Cong., 2d Sess. 11 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4704 [hereinafter cited as S. Rep. 92-1125; H.R. Rep. 92-1441].

Congress understood the law governing the rights of employees of independent contractors ashore and constructed the 1972 Amendments in light of that law. Both the Senate and House of Representatives committee reports state that a longshoreman suing a vessel is to be in a position neither better nor worse than an injured worker on land under analogous circumstances.

> The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.[5]

This Court has recognized the necessity of referring to the proper rules of tort law applicable to the issue at hand when interpreting the 1972 Amendments to avoid throwing out of balance a structure carefully constructed by Congress. In dealing with an issue which Congress had left to the maritime rules and not referred to land-based law, the Court said:

> [W]e are mindful that here we deal with an interface of statutory and judge-made law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change. "One of the most controversial and difficult issues which [Congress was] required to resolve . . . concern[ed] the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations." S Rep. 8. By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases

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[5] *Id.*

> advise, we should stay our hand in these circumstances.[6]

The general rules applicable to the issue now before the Court are those prevailing in land law; peculiar principles of maritime law are inapplicable.

> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.[7]

The legislative history thus directs courts to reject traditionally "expansive maritime tort liability" and embrace narrower and land-based rules.[8]

B. The Applicable Tort Rules Are Indicated in the Legislative History and Set Forth in Many Cases Both Before and Since the Enactment of 33 U.S.C. Section 905(b)

There is a consistent body of accepted principles of tort law concerning the duties and liabilities of parties in positions analogous to those of shipowners who turn their

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[6]Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 271-73 (1979) (footnotes and citations omitted); Bloomer v. Liberty Mutual Insurance Co., 48 U.S.L.W. 4211 (March 3, 1980) (No. 78-1418).

[7]S. Rep. 92-1125 at 10; H.R. Rep. 92-1441 at 4703.

[8]*See* Chavis v. Finnlines Ltd., 576 F.2d 1072, 1078 (4th Cir. 1978); Hurst v. Triad Shipping Co., 554 F.2d 1237, 1247 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 507 (2d Cir. 1976).

vessels over to independent stevedoring contractors. It is this body of law to which Congress referred and which it had in mind when it enacted the 1972 Amendments.

As we have shown, Congress intended the courts to apply generally prevailing land-based tort principles to longshoremen's negligence claims, but the legislative history goes farther and shows by specific example that the negligence action permitted was not intended to encompass a duty to supervise a qualified stevedore contractor.

In *Albanese v. N/V Nederl. Amerik Stoomv. Maats.*,[9] the trial court had permitted the jury to find negligence even in the absence of a showing that the shipowner had actual knowledge of an unsafe condition in the hold, if the jury determined that the condition had existed long enough to charge the shipowner with notice of it. The Court of Appeals said:

> This was erroneous, for when a shipowner hires a qualified stevedore to load the vessel the standard of due care does not require that he actively supervise the stevedore's work or that he take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist. . . . [T]o lay down a contrary rule . . . would be to confuse the concept of unseaworthiness with that of negligence.[10]

This Court dealt with the subject *per curiam* as follows:

> We believe that the judgment of the Court of Appeals setting aside the judgment for petitioner Albanese on the ground that the trial court incorrectly charged the jury on the issue of negligence is erroneous. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206.[11]

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[9]346 F.2d 481 (2d Cir.), *rev'd per curiam*, 382 U.S. 283 (1965).

[10]346 F.2d at 483.

[11]Albanese v. N/V Nederl. Amerik Stoomv. Maats., 382 U.S. 283 (1965).

The committee reports cite the *Albanese* case among a number of prior decisions of this Court which they disavowed for the future:

> Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act . . . *Albanese v. Maats,* 382 U.S. 283. . . .[12]

Thus the committees indicated that shipowners were to be freed from liability for the actions of stevedore contractors and that such liability was not to be reimposed by means of a duty to supervise.

Decisions in a great majority of the states establish the two principal general rules which underlie most of the decisions of the courts of appeals in favor of shipowners upon which we rely here. The first of these rules of land-based negligence law is that the owner of premises upon which he has engaged an independent contractor to work has a duty to use reasonable care to make the premises reasonably safe for the use of the independent contractor and to warn the contractor of dangers of which he knows and the contractor does not.[13] The second general rule is that the owner or occupier of premises who retains no more right of control over the independent contractor's work than that necessary to secure satisfactory completion of the work owes no duty to protect the contractor or its employees from dangerous conditions arising during the performance of the work.[14]

The American Law Institute, whose general formulations in the restatements of the law are synthesized from our

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[12]S. Rep. 92-1125 at 10; H.R. Rep. 92-1441 at 4703.

[13]Cases illustrative of the application of this rule in the great majority of the states which have had occasion to apply it are listed in Appendix I hereto.

[14]Cases illustrative of the application of this rule in the great majority of the states which have had occasion to apply it are listed in Appendix II hereto.

nationwide jurisprudence,[15] has expressed the first of the general rules stated above in sections 343 and 343A of the Restatement (Second) of Torts, and the second in sections 409-414. These Restatement sections, rather than the vast underlying bodies of jurisprudence, have been cited by the courts of appeals in most of the numerous cases with which the court below is avowedly at odds.[16] (The Restatement sections are set forth in Appendix III.)

Other sections of the Restatement have been cited, although less often, and are highly relevant to the general problem. Section 388, concerning responsibility of the supplier of a chattel for use by another, has been cited in denying liability where a stevedore used a patently defective ladder belonging to the vessel.[17] And section 414A, rather than section 343, has been relied on where the injury occurred on the pier and thus off the shipowner's premises rather than on them.[18] These sections provide a range of land-based duty standards applicable according to the varying circumstances, such as an injury on the pier caused by activities on the vessel (§ 414A), the activities of the steve-

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[15]This Court has frequently referred to the Restatement of Torts as the source of generally applicable tort principles. Ingraham v. Wright, 430 U.S. 651, 661 (1977) ("prevalent rule"); Laird v. Nelms, 406 U.S. 797, 800 (1972) ("presently prevailing view"); Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202 (1967) ("general rule of the law of torts"); Pierson v. Ray, 386 U.S. 547, 555 (1967) ("prevailing view in this country"); Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 501 (1964) ("scholarly authority"); *see also* Owen v. City of Independence, 48 U.S.L.W. 4389, 4405-6 (April 16, 1980) (No. 78-1779) (Powell, J., dissenting) ("leading commentator").

[16]These cases are analyzed in this brief at pp. 18-19, *infra*.

[17]Castel v. Moller, A.P., 441 F.Supp. 851 (N.D. Cal. 1977).

[18]Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978).

dore contractor on board (§§ 409-411), the condition of tools, rigging, machinery and other appurtenances furnished (§ 388), or the condition of the premises themselves, that is to say, the decks, walkways and other structures (§§ 343 and 343A).

Since Congress did not intend to impose after 1972 a heavier burden of care and concern than before, another possible source of the duty standard is the pre-1972 jurisprudence on the subject of the shipowner's duty to protect longshoremen, apart from the warranty of seaworthiness (which was abolished in 1972). In *Hugev v. Dampskisaktieselskabet International,*[19] the district court, in a remarkable opinion adopted by the Court of Appeals, displayed a practical view of the problems of a vessel's condition upon arriving in port and of the reliance of the shipowner upon the expertise of a stevedore contractor[20] and laid out the duty of the shipowner for the protection of the stevedore's employees as follows:

> (1) to exercise ordinary care under the circumstances to place the ship on which the stevedoring work is to be done, and the equipment and appliances aboard ship, in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care under the circumstances to load or discharge the cargo, as the case may be, in a workmanlike manner and with reasonable safety to

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[19]170 F.Supp. 601 (S.D. Cal. 1959), *aff'd sub nom.*, Metropolitan Stevedore Co. v. Dampskisaktieselskabet International, 274 F.2d 875 (9th Cir.) (adopting district court opinion), *cert. denied,* 363 U.S. 803 (1960).

[20]On these points the case was cited with approval in Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 323 (1964).

> persons and property; and (2) to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract.[21]

The standard recognized by the court in *Hugev* and ignored or abandoned without comment in the decision below, while it may not cover all situations, probably covers most and clearly expresses the overwhelmingly prevalent land-based tort rules with respect to premises and independent contractors discussed above and articulated in Restatement sections 343, 343A and 409, *et seq.*

The *Hugev* standard quoted above was set forth in full in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*[22] as an indication of the shipowner's duty to oversee the safety of longshoremen. This Court said of it:

> While the court identified these obligations as implied in fact from the stevedoring contract, it indicated that they also constituted "the duty of ordinary care im-

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[21]170 F. Supp. at 610-611.

[22]394 U.S. 404, 416-17 n.18 (1969). It has been debated whether the holding in this case has survived the 1972 Amendments to the Act. *See, e.g.*, Landon v. Lief Hoegh & Co., 521 F.2d 756, 761 (2d Cir. 1975), *cert. denied sub nom.*, A/S Arcadia v. Gulf Ins. Co., 423 U.S. 1053 (1976). However that might turn out if the issue were presented in a proper case (and there is no occasion to present it here), expressions in the *Federal Marine Terminals* case concerning the law as it existed in 1969, including the shipowner's duty of supervision, would be unaffected.

posed by law toward 'persons rightfully transacting business on ships.' "[23]

The Court went on to note another case similar to *Hugev* as follows:

> In the case of *Mickle v. The Henrietta Wilhelmine Schulte*, 188 F. Supp. 77, 80, the District Court for the Northern District of California, while rejecting the argument that such obligations were contractual, agreed that the occupier of a ship "owes certain duties of care to a business invitee, especially to an independent contractor, such as a stevedore company, which comes onto the premises to perform services, 2 Harper & James, The Law of Torts, Section 27.12 (1956), including the duty not to cause injury by negligent activity, 2 Restatement of Torts, Section 341; the duty to warn of latent perils actually known to the occupier, Prosser on Torts, 453 (1955); and the duty to inspect the premises to discover dangerous conditions. 2 Restatement of Torts, Section 343. See generally, Prosser, supra, 452-62."[24]

Prior to 1972, this Court also faced the question of the shipowner's duties in a case where the ship had been withdrawn from navigation for repair so that there was no warranty of seaworthiness. The duty was defined in *West v. United States*[25] in full consonance with the Restatement, *Hugev* and *Mickle*.

> But here the owner had no control of the ship; it had been turned over to a repair contractor for extensive overhaul, which was not performed under the direction of the shipowner. While there might be instances of hidden or inherent defects, sometimes called "latent," that would make the owner guilty of negligence, even though he had no control of the re-

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[23]394 U.S. at 417 n.18.

[24]*Id.*

[25]361 U.S. 118, 124 (1959).

> pairs, we hold that under the circumstances here the shipowner could not be so chargeable.[26]

In ruling on this question after the effective date of the 1972 Amendments, the majority of the courts of appeals have adopted one or another of the preceding approaches in order to limit the shipowner's duty to oversee the stevedore's operations. In a number of decisions they applied Restatement sections 343 and 343A;[27] a second group of decisions relied upon the application of Restatement sections 409 to 415, dealing with the duty to supervise one's

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[26]*Id. West* has been applied since the 1972 Amendments in Riddle v. Exxon Transp. Co., 563 F.2d 1103, 1115 (4th Cir. 1977).

[27]Lubrano v. Royal Netherlands S.S. Co., No. 79-7228 (2d Cir. March 31, 1980); Giglio v. Farrell Lines, Inc., 613 F.2d 429 (2d Cir. 1980); Mattivi v. South African Marine Corp., 618 F.2d 163 (2d Cir. 1980); Lopez v. A/S D/S, Svendborg, 581 F.2d 319, (2d Cir. 1978); Canizzo v. Farrell Lines, Inc., 579 F.2d 682 (2d Cir.) *cert. denied,* 439 U.S. 929 (1978); Lubrano v. Royal Netherlands S.S. Co., 572 F.2d 364 (2d Cir. 1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449 (2d Cir. 1978); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976); Chavis v. Finnlines, Ltd., 576 F.2d 1072 (4th Cir. 1978); Riddle v. Exxon Transp. Co., 563 F.2d 1103 (4th Cir. 1977); Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757 (4th Cir. 1976), *cert. denied,* 429 U.S. 1098 (1977); Stockstill v. Gypsum Transp., 607 F.2d 1112 (5th Cir. 1979); McCullough v. The S/S Coppename, 608 F.2d 208 (5th Cir. 1979) (opinion withdrawn by order of the court); Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir. 1978), *cert. denied,* 443 U.S. 915 (1979); Wiles v. Delta S.S. Lines, Inc., 574 F.2d 1338 (5th Cir. 1978); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Hess v. Upper Miss. Towing Corp., 559 F.2d 1030 (5th Cir. 1977), *cert. denied,* 435 U.S. 924 (1978); Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1997), *cert. denied,* 435 U.S. 934 (1978); Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979).

independent contractors;[28] and a third group limited the vessel owner's exposure by refusing to impose a duty to supervise the stevedoring operation where the shipowner had relinquished full control to the stevedore.[29] Although these approaches are not identical, similar results will be reached in most cases under any one of them because each recognizes the need to place reasonable limitations upon the shipowner's duty to inspect or supervise the stevedore's work for the protection of the stevedore's own employees. In limiting the vessel owner's duty to the longshoremen, these rules are uniformly at odds with the rule confected by the court below.

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[28]Anderson v. Iceland S.S. Co., 585 F.2d 1142 (1st Cir. 1978); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977); Rich v. U.S. Lines, Inc., 596 F.2d 541 (3d Cir. 1979); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), *cert. denied,* 434 U.S. 861 (1977).

[29]Lubrano v. Royal Netherlands Steamship Co., No. 79-7228 (2d Cir. March 31, 1980); Cox v. Flota Mercante Grancolombiana, S.A. 577 F.2d 798 (2d Cir.), *cert. denied,* 439 U.S. 881 (1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 510 F.2d 449 (2d Cir. 1978); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), *cert. denied,* 434 U.S. 861 (1977); Roberts v. Andrew Martin Sea Services, Inc., No. 78-2219 (5th Cir. May 30, 1980); Briley v. Charente S.S. Co., 572 F.2d 498 (5th Cir. 1978); Westcott v. Impresas Armadoras, S.A., 564 F.2d 875 (9th Cir. 1977).

C. The Shipowner Owes a Duty to Use Due Care When It Has Superior Knowledge or Control; Otherwise It May Rely on the Stevedore Company to Work so as to Avoid Obvious Hazards and Choose Safe Methods

Considering the policy expressed in the OSHA regulations directed exclusively to stevedore employers,[30] the judicial and congressional recognition that the primary burden of safety should be placed upon the stevedore as best able to deal with it,[31] and the congressional policy that the emphasis be returned to compensation payments, leaving third-party suits for exceptional cases,[32] there is much to be said, following 1972, for a rule precluding recovery from the shipowner whenever the injury has resulted from a stevedore company's breach of its obligation of workmanlike service, including, of course, any breach of the OSHA regulations. There is a substantial body of industry opinion that this should be the rule. Or the Court could well choose to state the rule as it was stated in the *Hugev* case.

Based, however, upon the history and doctrinal development both before and after 1972, the following general rule may be stated, which will be found to be consistent with the intent of Congress, the pre-1972 negligence law in this field, the overwhelming weight of dry-land authority and the great majority of post-1972 appellate decisions:

> The vessel has a duty for the protection of longshoremen employed on or about her, to exercise reasonable care in the circumstances:
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> 1. to deliver the areas of the ship and her equipment to be used by the stevedore in such condition that an expert and experienced stevedore contractor will be able to eliminate or avoid dangers encountered

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[30]The Safety and Health Regulations for Longshoring, 29 C.F.R. Part 1918 impose responsibilities only on employers of longshoremen. See 29 C.F.R. §§ 1918.2 and 1918.3(d).

[31]See Section II.A., *infra*.

[32]See Section II.B., *infra*.

in the course of its work and to perform its work with reasonable safety by the exercise of reasonable care;[33]

2. to warn the stevedore contractor of any danger of the ship or her equipment which is not known or obvious to the stevedore contractor and which is known or in the exercise of reasonable care should be known to the vessel, and is not reasonably to be expected by an expert and experienced stevedore contractor, but is likely to be encountered in its work;[34] and

3. to avoid causing injury by the vessel's own activities, by her active control of the stevedore contractor's activities, or from dangerous conditions which the longshoremen should reasonably be expected to encounter in areas or equipment over which the vessel has retained active control.[35]

D. The Standard Adopted Below Conflicts With General Land-Based Principles

The standard adopted below conflicts in two major respects with the established rules Congress intended the courts to apply.

First, it requires the shipowner to supervise operations conducted by the stevedore company to determine whether

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[33] *Cf. generally* Hugev v. Dampskisaktieselskabet International, 170 F.Supp. 601 (S.D. Cal. 1959), *aff'd sub nom.*, Metropolitan Stevedore Co. v. Dampskisaktieselskabet International, 274 F.2d 875 (9th Cir.), *cert. denied*, 363 U.S. 803 (1960). The criterion of expertise and experience is rooted also in Restatement sections 343 (b), 388(b), 414, 414A.

[34] *Cf. generally Hugev.* The requirement of warning is rooted in Restatement sections 343 and 388. The distinction of known or obvious conditions is rooted in Restatement sections 343(b), 343A (1) and 388(b), and that of conditions reasonably to be expected by the contractor in sections 343(b) and 388(b).

[35] This is rooted in Restatement sections 284 and 315 as to the vessel's activities, section 410 as to control of contractor activities and section 343 as to conditions in areas controlled by the vessel.

they are safe. Such a rule embodies the very duty of supervision which Congress thought it had eliminated when it disapproved the *Albanese* result.

Second, any liability which might be imposed on Scindia in this case would be the result of a condition which was both known and obvious, and apparently not objectionable, to the stevedore company.

To reach such a result the court below rejected the authority of twenty or more current cases in its own circuit and others. The result, moreover, disserves the policies Congress sought to promote and is based upon erroneous analysis of the legal issues, as the next two sections of this brief will show.

II

THE FAILURE TO APPLY LAND-BASED PRINCIPLES FRUSTRATES THE IMPORTANT POLICIES OF THE 1972 AMENDMENTS

A. The Rule Below Does Not Promote Safety

Making the waterfront safer was a fundamental concern of Congress in 1972, so fundamental that its achievement was not left to be solely dependent upon results of third-party actions. Instead, Congress enacted a vast increase in compensation benefits to supplement the existing scheme of safety and health regulations, providing the basis for a safe waterfront.

> This consideration [safety] is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry, and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a work-

> men's compensation system which maximizes industry's motivation to bring about such an improvement.[36]

By raising the level of workers' compensation benefits, Congress ensured that the cost of each accident would be imposed upon the longshoring and shipping industry. This imposition of the costs of accidents had previously been provided, only somewhat crudely and unfairly, by the shipowner's no-fault liability for unseaworthiness, which Congress now felt free to abolish.

> [G]iven the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness.[37]

Against the background of the regulatory and economic means provided to compel safety, the courts must now attempt to make third-party liability actions also promote safety. The court below failed to undertake this attempt; the opinion contains a ritualistic mention of safety but no analysis of whether its rule more effectively promotes safety than the Restatement rules it rejects.

The issues involved in such an analysis are easily identifiable: do third-party lawsuits cause the cost of accidents to be placed on the correct party and do they increase the costs in a manner which provides an additional incentive to make conditions safe? Analysis of these issues discloses that the rule announced below will often cause the costs of accidents to be imposed on the wrong party without increasing the total costs, and that the rule below therefore makes the waterfront less safe.

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[36]S. Rep. 92-1125 at 2.

[37]S. Rep. 92-1125 at 10; H.R. Rep. 92-1441 at 4703.

This Court has imposed the cost of waterfront accidents on the party who "was in a far better position . . . to avoid the accident",[38] and courts of appeals have recognized that they must interpret the 1972 Amendments to continue to impose the costs in the same way.[39] When the cost burden is imposed on parties in the better position to avoid accidents, it more efficiently and economically avoids accidents, since the effectiveness of the burden is a function of its size in relation to the cost of doing so. If the cost of avoidance is higher than the costs of the accident, then safety is jeopardized. If the cost of avoidance is lower, the safety is enhanced.

The contractor doing the work can generally avoid the accident at less cost even when the equipment in use is the shipowner's, and this case illustrates the point. Directing the work so that Santos did not work under the suspended load would have avoided the injury. Realistically only the stevedore company could have prevented Santos from doing so; it all happened in about ten minutes, and there is no reason to believe that the shipowner knew or could have learned of the method in use without redundant and expensive supervision of this and every other move made by the stevedore company. And, while it is true that only the shipowner could repair the winch, it is not true that the shipowner was in a position to decide whether it needed repair; if the winch was merely in less than perfect condition, but serviceable and capable of being used with reasonable safety, no need to fix it then and there arose. But if the stevedore could not devise a safe way to load cargo with the winch, then it needed to be fixed. Thus the

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[38]Italia Societa per Azioni di Navigazione v. Oregon Stevedore Co., 376 U.S. 315, 323 (1964).

[39]Munoz v. Flota Merchante Grancolombiana, S.A., 553 F.2d 837, 841 (2d Cir. 1977); Marant v. Farrell Lines, Inc., 550 F.2d 142, 144 (3d Cir. 1977).

stevedore company was better able to make that decision than the shipowner.

The court below may have supposed that imposing liability on the shipowner would increase the total cost arising from the accident and therefore the total incentive to provide safety. This assumption, however, is not correct, for even if it could be shown that third-party actions increase the total costs of accidents, it is also true that third-party actions relieve the stevedore of those costs and one cannot properly assume that the effect of any increase in the total costs will offset the inefficiencies introduced by shifting costs from the party with control to the party without it.

And, it cannot be demonstrated that tort actions against shipowners increase the total cost of accidents anyway, since the costs imposed through damage actions are computed differently from those imposed through the compensation system. A third-party tort judgment includes all of plaintiff's wage loss (although only for work expectancy), medical expenses and pain and suffering, but is then reduced for his comparative negligence. Compensation benefits under the 1972 Amendments have been increased to qualitatively higher levels,[40] and plaintiff recovers two-thirds of his wage loss and all of his medical expenses over his entire life[41] without reduction for comparative negligence. Factors such as age of the worker

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[40]"Generally workers' compensation benefits are not intended to compensate for an employee's entire losses. . . . The 1972 Amendments to the Act, however, make a determined effort to narrow the gap between the harm suffered and the benefits payable." Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 261 n.9 (1979).

[41]For a white male worker, for example, who is 50 years old or older and planning retirement at 62, life expectancy is more than double work expectancy. U.S. Bureau of the Census, Statistical Abstract of the United States (1979) Table No. 101.

and the nature of his negligent conduct make generalizations about the relative values of negligence cases and compensation cases impossible.

Since the costs imposed directly on the shipowner by third-party actions cannot be predicted generally to be greater than the costs imposed on the stevedore company through compensation payments, the role of third-party actions in shifting costs from stevedore to shipowner must be considered. The stevedore company, at least when it is not negligent, is entitled to recover its compensation expenses from plaintiff's judgment[42] and to satisfy its liability for future compensation out of the amount plaintiff receives from his third-party action.[43] Third-party tort damages, therefore, first reimburse the stevedore company for its compensation expense and satisfy its future liability. Only when the amount of a judgment exceeds the total past and future compensation expense is the cost of the accident increased by anything other than the legal fees.

If a stevedore company which wrongfully contributes to plaintiff's injury is also entitled to recover its lien, as is an innocent stevedore company,[44] the third-party negligence action will result in a shifting of the costs in every case where a jury finds both at fault to any degree. In such a scheme safety will be promoted by applying negligence principles which cause such a shift only when the ship-

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[42]Bloomer v. Liberty Mutual Insurance Co., 48 U.S.L.W. 4211, 4213 (March 3, 1980) (No. 78-1418).

[43]33 U.S.C. § 933(f) (1976).

[44]Whether Pope & Talbot v. Hawn, 346 U.S. 406 (1953), was still the law as late as 1972 or would be held now valid by the Court is a question not reached in *Edmonds*, 443 U.S. 256 (1979), or *Bloomer*, and not presented here. The argument may be made in some proper case that the stevedore cannot recover its lien if it has contributed to the accident by its fault, particularly by a breach of the Safety and Health Regulations for Longshoring, 29 C.F.R. Part 1918.

owner's failure of control was the primary cause of the injury. But under the result below the shift of costs to the shipowner would occur when the stevedore company's control and opportunity to avoid the accident were paramount and the shipowner's merely secondary or, in traditional tort terms, passive. The principles the shipowner urges will shift the burden to the shipowner when the shipowner has the better opportunity to avoid the accident because of superior knowledge or control or when its employees are careless in their actions. Otherwise the cost will remain on the contractor doing the work.

B. By Encouraging Frequent Third-Party Lawsuits, the Rule Below Subverts Primary Reliance on the Compensation Remedy

The Senate committee endorsed the 1972 Amendments because they would "provide an adequate, prompt, and equitable system of compensation for the over 800,000 employees who depend upon its protection."[45] Similarly, the House committee said:

> The objective of Congress in the matter of workmen's compensation is clear. It is to provide a modern workmen's compensation program for a substantial number of American workers and their families.[46]

Congress had ample cause for its belief that a workers' compensation system with adequate benefits was necessary to achieve both safety on the job and security for those who were injured. Experience had shown that the third-party action and the concomitant litigation over indemnity diverted financial resources which could be better used to pay compensation benefits, and workers were being encouraged to forego filing claims for compensation or delay their

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[45]S. Rep. 92-1125 at 2.

[46]H.R. Rep. 92-1441 at 4711.

return to work to increase the recoveries in these third-party actions.[47]

The third-party actions continue to divert resources to attorneys for what is often little or no benefit to the injured worker, and in so doing undermine the security inherent in the compensation system. The act itself prohibits lump sum settlement of compensation liabilities except where "it is for the best interests of an injured person entitled to compensation."[48] The third-party lawsuit, however, is a device for routinely obtaining lump sum payment of future compensation, since the compensation carrier is thereby relieved of the duty to pay compensation until a credit equal to the amount received from the judgment has been exhausted.[49] Indeed, it is difficult to demonstrate that in any significant number of cases the third-party action serves any purpose other than to convert compensation benefits into a lump sum partial award and reward the attorney who obtains it with a fee unregulated by the compensation authorities.[50]

While it is true that Congress did not mean to abolish third-party actions under all circumstances, Congress did intend to provide an efficient compensation system on which

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[47]S. Rep. 92-1125 at 9; H.R. Rep. 92-1441 at 4702-03. This Court, in Bloomer v. Liberty Mutual Insurance Co., 49 U.S.L.W. 4211 (March 3, 1980) (No. 78-1415), noted that Congress, in considering the 1972 Amendments, recognized that longshoremen's lawyers, rather than injured longshoremen, "were found to have been the primary beneficiaries of third party actions in the past". 48 U.S.L.W. at 4214 n.11; *see also* the dissenting opinion of Justice Blackman, 48 U.S.L.W. at 4217.

[48]33 U.S.C. §§ 908(i) and 916 (1976).

[49]33 U.S.C. § 933(f) (1976).

[50]Control over attorneys' fees in connection with the compensation award is committed to the Benefits Review Board, and receiving any additional fee is a crime. 33 U.S.C. § 928 (1976).

longshoremen could rely for prompt, fair and secure benefits following industrial accidents. Since third-party actions undermine the permanence and the security of the remedy, such actions ought to be restricted to those which foster the achievement of one or another of Congress' other goals for the 1972 Amendments. The decision below would subvert the compensation system and cause the proliferation of third-party actions. Third-party actions brought according to the principles of general negligence law, on the other hand, will restrict third-party recoveries to their proper role as incidental to primary reliance upon compensation.

C. The Rule Below Fails to Take Account of Other Rules Restricting the Fair Distribution of Loss

The very idea of limits on the shipowner's duty was rejected by the court below in an effort to avoid any rule "which prevents inquiry into the reasonableness of conduct under the circumstances of a given case".[51] If such limits, however, succeed in avoiding the imposition of liability on the shipowner when it has been minimally responsible and the stevedore company has been greatly at fault, the effect of certain inequities under the 1972 Amendments may also be avoided. In the *Edmonds* case[52] this Court found it inequitable but inevitable that a minimally negligent shipowner must pay the entire judgment, regardless how much the fault of the stevedore employer contributed to the accident. There is no other means of spreading the burden between the shipowner and stevedore in proportion to fault since the Amendments themselves bar indemnity, even by contract,[53] and the *Edmonds* holding confirms the absence

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[51]Pet. App., p. B-16, 598 F.2d at 488, *citing* Gallardo v. Westfal-Larsen A/S, 435 F. Supp. 484, 496 (N.D. Cal. 1977).

[52]443 U.S. 256 (1979).

[53]33 U.S.C. § 905(b) (1976).

of a right of contribution.[54] Since proportional fault and contribution as methods of achieving fairness and promoting safety[55] are foreclosed and another must be chosen, the best remaining choice is a rule which exonerates a minimally responsible party in preference to a rule which imposes all liability on that party for the benefit of the primary wrongdoer.

The collateral source rule may apply to keep evidence of compensation benefits from the jury and provide added incentive for an unfair judgment against a remotely responsible shipowner.[56] Since juries undoubtedly share the view that the costs of industrial injuries ought to be borne by the industry and not by the injured worker, one cannot pretend that a jury is conducting an inquiry into the reasonableness of the shipowner's conduct under all the circumstances if the jury is kept unaware that the basic costs of plaintiff's injuries are already borne by industry. If the jury were to be informed that the proceeds of the lawsuit went to satisfy the claims of the employer, its sense of justice might affect the result.

III

THE RESULT BELOW IS BASED UPON FAULTY LEGAL ANALYSIS

A. The Court below Erred By Attempting to Fashion New Rules

The court below misinterpreted the task before it. Rather than accede to the congressional directive to apply general tort principles, the Court of Appeals read the legislative

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[54]*See also* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 285 (1952).

[55]United States v. Reliable Transfer Co., 421 U.S. 397 (1975); Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974).

[56]*See* Hawkins v. United Overseas Export Lines, Inc., No. Y-79-1320 (D. Md., April 15, 1980).

history "as calling upon the federal courts to *fashion a negligence standard* responsive to five specific concerns." (Emphasis supplied.) Pet. App., p. B-7; 598 F.2d at 484. The court did not cite any legislative history nor any appellate authority in support of its understanding of its mandate, and there is no such authority since, as we have shown, Congress did not call upon the courts to *fashion* anything, but simply to apply general principles of land-based tort law.

B. The Court Misused the Legislative History

In support of its standard, the court below cited the district court opinion, even then already reversed, in *Anderson v. Iceland Steamship Co.*[57] and the illustration of the grease spot taken from the legislative history. Pet. App., p. B-11, 598 F.2d at 486 n.2. That illustration, however, provides no support for the court's departure from general tort principles; it was merely an example used by the committees to illustrate the fundamental distinction between negligence and unseaworthiness. Congress knew that a defendant's actual or constructive knowledge, while irrelevant to an unseaworthiness action, is the hallmark of a negligence action.[58] The committees, intent on abolishing the unseaworthiness remedy and preserving a remedy for negligence, restated the illustration to show that a dif-

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[57]431 F. Supp. 869 (D. Mass. 1977), *rev'd*, 585 F.2d 1142 (1st Cir. 1978).

[58]"For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it." S. Rep. No. 92-1125 at 9; H.R. Rep. No. 92-1441 at 4702; *cf.* Mitchell v. Trawler Racer Inc., 362 U.S. 539, 542, 549-50 (1960).

ferent result would occur after the amendments.[59] Thus, the illustration does not stand for the proposition that knowledge alone creates a duty to act.[60]

C. The Result Below Is Not Supported by Rules of State Law Governing Industrial Accidents

We have shown that the majority of states also have rules like those urged here and expressed in Restatement sections 343, 343A and 409, *et seq.*, for resolving negligence actions brought by employees of independent contractors. See Appendices I & II. The court below did not consider any of these authorities. Another common situation giving rise to industrial accident claims is that of general contractor and subcontractor, distinguished from that of the usual independent contractor by the greater control exercised over a subcontractor.[61] The exercise of that control by the general contractor makes him the "statutory

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[59]"So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore." S. Rep. No. 92-1125 at 10-11; H.R. Rep. No. 92-1441 at 4704.

[60]In an alternative approach to analyzing the grease spot example, Judge Friendly, in his dissenting opinion in Canizzo v. Farrell Lines, Inc., determined that the key terms used by the Committees in the example were "willfully or negligently" and "reasonable care under the circumstances", and found that reasonable care could not require the vessel to act to protect the longshoreman if it could properly expect the stevedore to do so. 579 F.2d 682, 688 n.5 (2d Cir. 1978).

[61]2A A. Larson, The Law of Workmen's Compensation § 72.31, at 14-58 (1978).

employer" in the vast majority of states and so immune from tort liability in most instances.[62] Thus in a large number of jurisdictions, the exercise of control over a contractor which would be sufficient to impose liability for negligence leads to immunity under the compensation statutes.[63]

Under the law of most states, therefore, the employer of a contractor is not held liable in tort under any such open-ended standard as reasonable care in the circumstances unrestricted by the Restatement rules of duty.[64]

D. The Court Below, in Failing to Focus Its Analysis Upon the Scope of the Shipowner's Duty, Falsely Perceived and Analyzed Problems Concerning Contributory Negligence and Assumption of Risk

The opinion below attempts to set forth a "standard of negligence" for actions under section 905(b). Pet. App., p. B-11, 598 F.2d at 484. The term, however, is not defined by the court and apparently includes both the standard of care and scope of duty.

As a standard of care, the formula stated by the Ninth Circuit, "reasonable care under the circumstances", is consistent with the historical concept of negligence. But before

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[62]*Id.* at 14-47 to 14-55.

[63]*See, e.g.* Stevens v. Colorado Fuel & Iron, 24 Utah 2d 214, 469 P.2d 3 (1970).

[64]California and New York are two notable exceptions, but those systems expressly permit vicarious liability rejected by Congress for the 1972 Amendments. Griesel v. Dart Industries, Inc., 23 Cal. 3d 578, 153 Cal.Rptr. 213, 591 P.2d 503 (1979); Allen v. Cloutier Construction Corp., 44 N.Y.2d 290, 405 N.Y.S.2d 630, 376 N.E.2d 1276 (1978). Massachusetts is the only state which may have a rule like that propounded below (Poirier v. Town of Plymouth, . . Mass. . ., Mass. Adv. Sh. (1978) 100, 372 N.E.2d 212 (1978)), but it did not have it in 1972, the relevant time for considering Congress' view of the general land-based law. Afienko v. Harvard Club, 365 Mass. 320, 312 N.E.2d 196 (1974).

one comes to the question of the standard of care, one must determine whether there is a duty at all.

A cause of action for negligence consists of four basic elements: duty, breach of duty, proximate cause, and damages. The standard announced below, however, fails to address the first element in its emphasis upon the second. It is not sufficient to say that the defendant failed to exercise reasonable care; the defendant cannot be liable unless he is first placed under some duty to exercise this level of care.[65] One may avoid a separate duty question when dealing with the consequences of clear-cut action, but when the "conduct" is less active and verges on a mere failure to act, the concept of duty has historically come into play.[66]

By requiring a vessel to supervise its independent contractors, which would be the inevitable result of simply adopting the "reasonable care under the circumstances" approach, the lower court assumed or created a new relationship requiring an affirmative duty to act, and in so doing has fashioned new law rather than follow the legislative mandate to incorporate existing land-based law principles.

Failure to focus adequately upon duty caused the court below to reject the scope of duty expressed in Restatement sections 343 and 343A on the ground that these Restatement sections limit liability through the defenses of contributory negligence and assumption of risk (Pet. App., p. B-13, 598 F.2d at 486), both of which, as absolute bars, are rejected by Congress. The court below failed to recognize that the proper scope of the duties set forth in Restatement sections 343 and 343A, as well as the scope proposed for adoption by this Court, are independent of the actual

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[65]W. Prosser, Law of Torts 143 (4th ed. 1971).

[66]"In the determination of the existence of a duty, there runs through much of the law a distinction between action and inaction." *Id.* at 338; *see also* Restatement sections 284, 314, 315 (1965).

behavior of the plaintiff or his independent contractor employer. Instead, the scope of the duty is defined by the vessel owner's reasonable expectations of the expert independent contractor's actions and abilities and resultant duty. Once it is determined that there was no duty or that the duty was met, the shipowner should not be found liable simply because the doctrines forbidden by Congress would have produced the same result, if the necessary facts were found. A holding that the defendant shipowner owed no further duty of supervision does not mean that the recovery has been barred by contributory negligence or assumption of risk.[67]

E. The Court Misunderstood and Misapplied the Holding of this Court in Kermarec v. Compagnie Generale Transatlantique

Kermarec v. Compagnie General Transatlantique[68] dealt with whether a vessel could avoid liability to a social guest of a seaman, injured while visiting on board a ship, on the ground that under New York law the guest was a licensee who could not recover without proof that the shipowner had actual knowledge of the dangerous condition which had injured him. The court below labored under three misapprehensions about *Kermarec*. First, it asserted that *Kermarec* rejected the incorporation of the "law of invitees", when what the Court rejected was the rule relating to licensees. Second, the court below assumed that *Kermarec* set forth land-based law, when it actually rejected land law in favor of an uniquely maritime rule. Third, the court below found *Kermarec* to stand for the proposition that "reasonable care under the circumstances" is the duty owed in all negligence cases. The language of *Kermarec,* however, disproves this. The Court fully recog-

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[67]Riddle v. Exxon Transp. Co., 563 F.2d 1103, 1110 (4th Cir. 1977).

[68]358 U.S. 625 (1959).

nized that different classes of persons do exist even in maritime law, with correlative, different duties of care owed to them.[69]

It is not proposed that this Court adopt the common law classification of "licensees" and thereby impose some duty standard lower than that generally applicable to invitees (the highest of standards except for special relationships, such as employment). Rather, it is submitted that the duties owed by an owner of premises to one generally classified as an invitee provide a guide for determining the appropriate duties of a vessel to the employees of its independent stevedore contractor. The status of independent contractor must necessarily have some effect upon the duties of the vessel to take affirmative action to inspect and supervise the contractor's work. Given the legislative mandate to apply land-based principles, the duties set forth in the formulations of the Restatement are appropriate analogies, and it is unimportant whether one recognizes the common law distinction between invitees and licensees dealt with in *Keramarec* since it is not suggested here that longshoremen be regarded as licensees.

This Court has never indicated that the *Kermarec* decision is inconsistent with Restatement principles. On the contrary, *Kermarec* was decided at a time when the Court assumed the vitality of such principles. The Court has therefore continued to cite the two together. Almost contemporaneously with *Kermarec* the Court decided *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*,[70] in which it recognized the principle that a shipowner's duties include responsibility "to correct or warn [stevedore] of a latent dangerous condition known to [shipowner] when [stevedore] began."[71]. The next term, the Court decided

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[69]358 U.S. at 632, n.9.

[70]355 U.S. 563 (1958).

[71]*Id.* at 568.

West v. United States[72] recognizing that both "control" and latency were relevant.[73]

The Court has since cited *Kermarec* and the Restatement principles themselves in the same breath. In *Federal Marine Terminals v. Burnside Shipping Co.*[74] the Court recognized *Kermarec* as holding that

> the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.[75]

The Court evidently did not view this statement, however, as abrogating the limitations on a shipowner's duty to oversee and supervise the work of the stevedore for the protection of the longshoremen, as it also quoted the duty standards set forth in *Hugev* and *Mickle,*[76] including reference to Restatement of Torts, sections 341 and 343, as standards applied by other courts in deciding this issue.

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[72]361 U.S. 118 (1959). See text accompanying notes 25 & 26 *supra.*

[73]*Id.* at 124.

[74]394 U.S. 404 (1969).

[75]394 U.S. at 415, quoting *Kermarec,* 358 U.S. at 632.

[76]394 U.S. at 415, 416-17 n.18. See Hugev v. Dampskisaktieselkabet International, 170 F.Supp. 601 (S.D. Cal. 1959), *aff'd sub nom.* Metropolitan Stevedore Co. v. Dampskisaktieselskabet International 274 F.2d 875 (9th Cir.) (adopting district court opinion), *cert. denied,* 363 U.S. 803 (1960); Mickle v. The Henrietta Wilhemine Schulte, 188 F. Supp. 77 (N.D. Cal. 1960). See discussion at notes 22-24, *supra* and accompanying text.

F. The Rule of the Court Below Is Based on an Unacceptable Derogation From the Principle That Longshoremen and Stevedore Contractors Must Stop Work When Conditions Are Dangerous if the Waterfront Is to Be Made Safer

The assertion that longshoremen "face trouble for delaying work"[77] has been discredited by this Court's approval, in *Whirlpool Corp.* v. *Marshall*[78], of the right conferred by OSHA regulations to walk off an unsafe job. The opinion below ignored congressional and judicial efforts to promote safety through conscientious enforcement of the OSHA regulatory scheme and gave grounds for optimism to those who might hope to make a longshoreman "face trouble for delaying the work."

In addition to being outdated, wrong and dangerous, the Ninth Circuit views on stopping work missed the point. The scope of the shipowner's duty does not depend on the rights of the individual longshoremen or the knowledge possessed by individual longshoremen of particular dangers aboard the vessel. The standard depends upon what the shipowner may reasonably expect the expert *stevedore company* (not the individual longshoremen) to be able to do when confronted with conditions requiring special care. The stevedore company has an unquestioned power and

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[77]Pet. App., p. B-17, 598 F.2d at 488.

[78]48 U.S.L.W. 4189 (February 26, 1980) (No. 78-1870).

obligation to stop working in a dangerous manner, to find a way to do the work safely[79] and to charge the cost of it, along with any stand-by time, to the shipowner who also suffers the loss of any delay to its vessel. No one has suggested that a stevedore company faces trouble for doing so. And it is the one sure-fire method which imposes the costs of unsafe conditions on the shipowner and prevents injuries at the same time.

The standard announced below assumes the helplessness of individual longshoremen and ignores the power and duty of their stevedore employer to refuse to work in a dangerous manner. It is inappropriate to base the shipowner's duty on the assumption, and sanction, of such ignorance.

IV

THE RULING BELOW HAS A SUBSTANTIAL ADVERSE IMPACT UPON SHIPOWNERS' LIABILITIES AND THE ABILITY TO DISPOSE OF UNMERITORIOUS CASES

A. By Eliminating Traditional Threshold Requirements, the Rule Makes It Impossible to Dispose of Clearly Unmeritorious Cases Without Full Trial

Before the Court of Appeals' decision in this case, the courts were generally applying traditional rules limiting

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[79]Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978); Slaughter v. S.S. Ronde, 390 F. Supp. 637, 640 (S.D. Ga. 1974), *aff'd*, 509 F.2d 973 (5th Cir. 1975); Ramirez v. Toko Kaiun, K.K., 385 F. Supp. 644 (N.D. Cal. 1974). Of course, the right to stop work in the face of dangerous conditions was well established prior to the passage of the 1972 Amendments. In Brock v. Coral Drilling Inc., the Court of Appeals for the Fifth Circuit stated:

> It is clear . . . that a stevedore must not continue to work its crew in the face of an unsafe or unseaworthy condition. Rather, it must remedy the situation itself, have the shipowner remedy it, or stop the operation. 477 F.2d 211, 216 (1973);

See also Albanese v. N/V Nederl. Amerik Stoomv. Maats., 346 F.2d 481, 484 (2d Cir.), *rev'd per curiam*, 382 U.S. 283 (1965).

the shipowner's duty to protect the longshoremen in cases in which the hazard was known or obvious to the stevedore contractor[80] or control had been relinquished to the stevedore contractor[81] or the injury was clearly due to an act or omission of the contractor.[82]

Under these traditional standards, summary judgment was available in many instances.[83] This had direct results, not only in the economical disposition of particularly unmeritorious cases in which the stevedore's responsibility for the injury had been manifest while the shipowner's responsibility had been remote or nonexistent, but in discouraging counsel from filing similar cases of little or no essential merit as an alternative to reliance upon compensation benefits.

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[80]Cases collected at note 27, *supra.*

[81]Cases collected at note 29, *supra.*

[82]Cases collected at note 28, *supra.*

[83]*E.g.*, Roberts v. Andrew Martin Sea Services, Inc., No. 78-2219 (5th Cir. May 30, 1980); McCullough v. S/S Coppename, 608 F.2d 208 (5th Cir. 1979) (opinion withdrawn); Briley v. Charente S.S. Co., 572 F.2d 498 (5th Cir. 1978); Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977).

Directed verdicts[84] and judgments n.o.v. upon the same grounds[85] have had the same effect of encouraging longshoremen and their lawyers to rely upon the liberal compensation benefits now available rather than a damage suit of little or no merit. Thus, the application of traditional standards has no doubt resulted in the filing of notably fewer cases.

Regardless of actual merit, it is notoriously difficult to deal with reasonable care questions by motion.[86] But the duty standard announced by the court below eliminates the traditional threshold questions and is dependent upon issues of reasonable care at every point. It would hold the ship to reasonable care to protect the longshoremen from every condition which reasonable care would discover, whether known or unknown, obvious or otherwise, and

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[84]*E.g.*, Stockstill v. Qypsum Transp., 607 F.2d 1112 (5th Cir. 1979); Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), *cert. denied*, 434 U.S. 861 (1977); Bess v. Agromar Line, 518 F.2d 738 (4th Cir. 1975).

[85]*E.g.*, Mattivi v. South African Marine Corp., 618 F.2d 163 (2d Cir. 1980); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977); Rich v. U.S. Lines, Inc., 596 F.2d 541 (3d Cir. 1979); and *cf.*, *e.g.*, following cases reversed on appeal where a judgment n.o.v. should have been granted: Anderson v. Iceland S.S. Co., 431 F.Supp. 869 (D. Mass. 1977), *rev'd*, 585 F.2d 1142 (1st Cir. 1978); Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798 (2d Cir.), *cert. denied*, 439 U.S. 881 (1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449 (2d Cir. 1978); Munoz v. Flota Merchante Grancolombiana, S.A., 553 F.2d 837 (2d Cir. 1977); Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977); Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979); Wescott v. Impresas Armadoras, S.A., 564 F.2d 875 (9th Cir. 1977).

[86]Gross v. Southern Railway, 414 F.2d 292, 296 (5th Cir. 1969); *see also* Arney v. United States, 479 F.2d 653, 660 (9th Cir. 1973); Trotter v. Anderson, 417 F.2d 1191, 1192 (7th Cir. 1969).

regardless who were in charge and whose act or omission were involved.[87]

Thus the Court of Appeals has resubmerged in the generality of "reasonable care" those essential and discriminating qualifications which American courts, in their experience of thousands of decisions, have identified and raised out of it over the years, and the result is that the prospect is presented of drawing out every case through trial, however slight its essential merit in all the circumstances. With the cost of litigation at present levels, this has the effect of creating a large bargaining counter for possible settlement, regardless of merit. The prospect of obscuring the stevedore contractor's primary safety responsibilities and the liberality of compensation benefits, together with the threat to defendants created by the increased cost of proceedings, will encourage the filing of more cases and less meritorious ones and increase not only the private costs of determining their merit, but also costs which are passed on to the public.

B. The Ruling Below, Augmented by Misinterpretations of the Edmonds Decision, Has Led to the Imposition of Even Further Burdens Upon the Shipowner

As though it were dealing with a subject of which there had not been vast industrial and judicial experience, the court below proposed a duty standard devoid of concrete qualification for the guidance of courts and juries. The expression "under the circumstances" has proved too vague and general and has produced results inconsistent with congressional policy.

The same court, a little less than four months after its decision in *Santos,* relied upon its *Santos* opinion in de-

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[87]Pet. App., p. B-11; 598 F.2d at 485.

ciding *Bachtel* v. *Mammoth Bulk Carriers, Ltd.*[88] Ignoring the most important of circumstances, the court there appeared to reject consideration of the stevedore's function and its conceded negligence in determining fault of the vessel. It then attempted to support the position by citing this Court's *Edmonds* decision, which dealt with a considerably different issue.[89] Having thus peremptorily decided that the violation of OSHA regulations by a stevedore contractor, to whom they were exclusively directed, could not be viewed as in any degree a shield for the shipowner, the court went quickly on to fashion the regulations into a sword and hand it to the plaintiff longshoreman.[90]

Next, despite the weight of numerous contrary opinions in its own and other circuits, the Court of Appeals for the Seventh Circuit, in *Matthews v. Ernst Russ Steamship Co.*,[91] again acknowledging the inspiration of *Santos*, also ignored the stevedore's control of the area and the activities therein as a circumstance of importance to be taken into account. It again cited this Court's *Edmonds* decision as authority for doing so.[92] The court dealt similarly

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[88]605 F.2d 438 (9th Cir. 1979), No. 79-538 on petition for certiorari in this Court.

[89]605 F.2d 438, 443 (9th Cir. 1979). The following day, the same court apparently did the same thing, again on the authority of the *Edmonds* case, in Lawson v. United States, 605 F.2d 448, 453 (9th Cir. 1979). Although the inartful language would make it appear that negligence of the stevedores was urged as a general bar to vessel owner liability, this was not the argument made by the shipowner. Indeed, in *Lawson*, the shipowner explicitly disavowed any theory of a bar based on the existence of stevedore negligence. Reply Brief for the Appellant at 5, Lawson v. United States.

[90]605 F.2d at 444-46.

[91]603 F.2d 676 (7th Cir. 1979) No. 79-624 in this Court.

[92]603 F.2d at 680. Likewise, in Johnson v. A/S Ivarans Rederi, 613 F.2d 334, 350 (1st Cir. 1980), the same view was taken in rejecting jury instructions which were admittedly good law and would have called the attention of the jury to the functions of the stevedore, the court appearing to think that it was not relevant to

with the circumstance that the defect of the ladder there in question was known or obvious and supported its indifference by further reference to the *Edmonds* case.[93] With such momentum and a growing conviction of the serviceability of the *Edmonds* case, the court went on to cite it finally as authority that, since the 1972 Amendments, the heavier burden of the causation rule heretofore restricted to FELA and Jones Act cases should be laid upon the shipowner in longshoremen's suits;[94] such a proposition flies in the face of this Court's statement in *Edmonds* that liability arises only when the shipowner's negligence is a "substantial factor" in causing the plaintiff's injury.[95]

This pattern has been brought to a climax in *Johnson v. A/S Ivarans Rederi*[96] where the court, building again on *Santos* and its progeny and rejecting the great body of contrary authority, announced the extravagant conclusion: "Doubt as to the interpretation of the Act and the development of standards of care implementing it must be resolved in favor of the longshoreman," citing the *Edmonds* case for the proposition.[97]

Nothing in the evidence of Congressional intent nor, for that matter, anything explicit in the *Santos* opinion itself, justifies so mischievous a line of doctrinal development, and surely nothing in this Court's *Edmonds* opinion provides the support for which it is so frequently cited.

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the issues of the case to state such matters as that the shipowner was not responsible for the conduct of the stevedore contractor or that there was no duty on the ship to supervise or oversee the contractor's work.

[93]603 F.2d at 679-80.

[94]603 F.2d at 681.

[95]443 U.S. 256, 271 n. 30; *see also id.* at 265 n. 15.

[96]613 F.2d 334 (1st Cir. 1980), No. 79-1589 in this Court on petition for certiorari.

[97]613 F.2d at 347-48.

V

THE DECISION OF THE TRIAL COURT WAS CORRECT

A. The Trial Court Correctly Decided That the Shipowner Had Not Been Negligent

The district court properly concluded that the shipowner could not be found negligent under the standards of Restatement sections 343 and 343A, and it would have reached the same result under the standard Petitioner proposes.

Under Restatement sections 343 and 343A there is no doubt that any defective condition of the winch was both obvious and actually known to the supervisory personnel of the stevedore company, since no one disputes that longshoremen "had complained to superiors . . . ."[98] The condition was, moreover, obvious enough that the shipowner was thought to be possibly chargeable with knowledge simply because it had agents walking through the area.[99]

Obviousness alone is not enough under the standard applied by the district court. A landowner may be liable under section 343A if he should have anticipated harm despite the obviousness of the condition.[100] But there was certainly no reason for a shipowner to expect that a stevedore contractor, in control of the operation and continuing to work without complaint despite a regulation requiring it to report any defect in the winch to the ship,[101] would not deal safely with the winch.

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[98]Pet. App., p. B-19, 598 F.2d at 489.

[99]*Id.*

[100]*See* Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976).

[101]29 C.F.R. § 1918.53(a)(5) provides:

> Any defect or malfunction of winches shall be reported immediately to the officer in charge of the vessel.

The standard Petitioner proposes leads to the same conclusion reached by the trial court since the condition was obvious and under the control of the stevedore company.

Plaintiff proposed to prove no more than that the defect might have existed prior to the commencement of the work and then to hope that a jury would find negligence. Under the pre-1972 law, as recognized in the Ninth Circuit, such proof is insufficient. In *Partenweederei, MS Belgrano v. Weigel*,[102] Weigel's unseaworthiness claim had failed because he lacked the status to maintain it and he urged a negligence theory based upon a malfunction in the ship's winch discovered by longshoremen the day before the accident but not reported to the crew. The district court held there had been negligent inspection, but the Court of Appeals reversed.

> What did libelant establish? He established: (1) That the accident occurred; (2) That it occurred because of the malfunctioning of the pawl and ratchet device; and (3) That the stevedores discovered the malfunctioning of the device shortly after cargo loading operations commenced on the day before the accident. From these facts, libelant contends that the District Court properly inferred that a reasonable inspection by respondents would have revealed the cause of the malfunctioning. The vice of that argument is the absence from the record of any testimony establishing, or tending to establish, the standard of conduct which respondents were required to meet in discharge of their duty to make a reasonable inspection to see that the gear and equipment furnished by them operated properly . . . .
>
> On the record in this case, we are constrained to hold that the libelant failed to meet the burden of

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[102]299 F.2d 897 (9th Cir.), *cert. denied*, 371 U.S. 830 (1962).

> proof resting upon him of establishing negligence on the part of the respondents.[103]

Santos did not offer to prove any more than Weigel had, and because pre-1972 negligence cases such as *Hugev, West*[104] and *Belgrano* should be persuasive, Santos should succeed no better than Weigel.

B. The District Court Properly Decided That Any Defect in the Winch Was Not a Proximate Cause of the Accident

The trial judge decided that any defect in the winch had not been a proximate cause of Santos' accident.[105] The decision was proper. The question of proximate causation on undisputed facts or facts assumed as plaintiff would have them is a legal question properly decided by the court,[106] as the court below itself has done under the 1972 Amendments.[107] Given the facts surrounding the accident, including the stevedore's exclusive control over the winch and the unloading operation, and the reasonable expectations of the shipowner regarding the stevedore's supposedly safe work methods, the district court's finding that the alleged

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[103]299 F.2d at 904. Part of this case concerning the indemnity was vacated, 302 F.2d 730 (9th Cir. 1962). The substantive portion of the case, dealing with Weigel's failure of proof, has been subsequently cited with approval in Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9th Cir. 1970).

[104]See Section I, *supra.*

[105]Pet. App., p. A-5.

[106]W. Prosser, The Law of Torts 241 (4th ed. 1971).

[107]"For this court to uphold plaintiff's verdict and ignore the fact that [the stevedore] had control of the unloading process, had knowledge of the nature and attendant dangers of the cargo, and by proper unloading techniques . . . could have prevented the injury to Davison is to ignore the proximate cause of this accident." Davison v. Pacific Inland Navigation Co., 569 F.2d 507, 514 (9th Cir. 1978).

defect was not a proximate cause of plaintiff's injury was correct.[108]

C. The Trial Court Was Not Guilty of Making "Findings" on Material Issues

The Court of Appeals reversed because it found there were disputed issues of fact material to the standard it fashioned, and it asserted that the trial court had resolved those disputes.[109] Actually, the trial court had not resolved those issues; it ignored disputes as to issues not material under the proper standard and assumed the plaintiff's version on those which might have been material.

First, the Court of Appeals faulted the district judge for deciding whether or not the shipowner had gained knowledge of the slipping of the winch.[110] But since it did not matter whether the shipowner could have discovered the defect in the winch, the issue was not material. Under any proper standard, no duty to take action arises from knowledge of such an obvious condition under the control of the stevedore company.[111]

Second, if the trial court failed to make a distinction between "control" and "exclusive control",[112] such a point has no bearing on the outcome. The control, whether exclusive or not, exercised by the stevedore company was sufficient to enable it to protect its employees. The winch

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[108]See for example, Cox v. Flota Merchante Grancolombiana, S.A., 577 F.2d 798, 802 (2d Cir.), *cert. denied*, 439 U.S. 881 (1978); McCullough v. The S/S Coppename, 608 F.2d 208, 211 (5th Cir. 1979); Gay v. Ocean Transport & Trading, Ltd., 546 F 2d 1233, 1242 (5th Cir. 1977).

[109]Pet. App., p. B-18, 598 F.2d at 489.

[110]Pet. App., pp. B-18 to B-20, 598 F.2d at 489-90.

[111]Albanese v. N.V. Nederl. Amerik Stoomv. Maats., 346 F.2d 481 (2d Cir.), *rev'd per curiam*, 382 U.S. 283 (1965).

[112]Pet. App., p. B-21, 598 F.2d at 490; *cf.* Pet. App., p. A-4; Pre-Trial Order, A.11.

was not being operated by crew members, and the stevedore company possessed all the control it needed to stop working if there was a defect to be corrected.

Third, the trial court did not ignore the claim that the "jumpiness" of the winch caused the initial spillage. On the contrary, it assumed from the outset that a defect had caused the injury, as claimed by the plaintiff.[113]

Fourth, the Court of Appeals also claimed that the trial court had attributed the second spillage to swinging of the pallet and not to the defect.[114] (Did the court really mean to suggest that the district court failed to consider that the defect caused either spillage? The district court had, after all, taken explicit note that the "jumpiness" was obvious.) Since the trial court held the shipowner not liable for the condition which permitted the load to slip, it mattered not whether that condition caused the first spillage, the second, or both.

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[113]Pet. App., pp. A-3 & A-5, *cf.* Pet. App., p. B-22, 598 F.2d at 490.

[114]Pet. App., p. A-3, 598 F.2d at 490.

CONCLUSION

For the foregoing reasons the Court should reverse the judgment of the Court of Appeals for the Ninth Circuit and thus restore the summary judgment entered by the district court and should also explicitly recognize the duty standard provided by land-based law, as set forth above, for the guidance of lower courts in future cases.

Respectfully submitted,

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(Appendices Follow)

APPENDIX I

Alabama: Hughes v. Hughes, ... Ala. ....., 367 So.2d 1384 (1979).

Alaska: Ferriss v. Chugach Electric Association, 557 P.2d 763 (Alaska 1976).

Arizona: Pruett v. Precision Plumbing, Inc., 27 Ariz. App. 288, 554 P.2d 655 (1976).

Arkansas: Dunn v. Brown & Root, Inc., 455 F.2d 717 (8th Cir. 1972).

Gordon v. Matson, 246 Ark. 533, 439 S.W.2d 627 (1969).

Colorado: J & K Construction Co. v. Molton, 154 Colo. 214, 390 P.2d 68 (1964).

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Florida: Rist v. Florida Power & Light Co., 254 So.2d 540 (Fla. 1971) (per curiam).

Georgia: Hodge v. United States, 310 F.Supp. 1090 (M.D. Ga. 1969), *aff'd per curiam,* 424 F.2d 545 (5th Cir. 1970).

Hawaii: Pickard v. Honolulu, 51 Haw. 134, 452 P.2d 445 (1969).

Illinois: Nowicki v. Union Starch & Refining Co., 54 Ill.2d 93, 296 N.E.2d 321 (1973).

Indiana: Dismore v. Aetna Casualty & Surety Co., 338 F.2d 568 (7th Cir. 1964).

Iowa: Clinton Foods, Inc. v. Youngs, 266 F.2d 116 (8th Cir.), *cert. denied,* 361 U.S. 828 (1959).

Kansas: Graham v. Loper Electric Co., 192 Kan. 558, 389 P.2d 750 (1964).

Kentucky: Olds v. Pennsalt Chemicals Corp., 432 F.2d 1033 (6th Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

Louisiana: McIlwain v. Placid Oil Company, 472 F.2d 24 (5th Cir.), *cert. denied,* 412 U.S. 923 (1973).

Maine: Stanley v. United States, 476 F.2d 606 (1st Cir. 1973).

Levesque v. Fraser Paper, Ltd., 159 Me. 131, 189 A.2d 375 (1963).

Maryland: Bauman v. Woodfield, 244 Md. 207, 223 A.2d 364 (1966).

Le Vonas v. Acme Paper Board Co., 184 Md. 16, 40 A.2d 43 (1944).

Mississippi: Downs v. Corder, 377 So. 2d 603 (Miss. 1979).

Missouri: Kelly v. Dairy Queen Enterprises, Inc., 581 S.W.2d 903 (Mo. Ct. App. 1979).

Montana: Shannon v. Howard S. Wright Construction Co., 593 P.2d 438 (Mont. 1979) (citing Napoli v. Hellenic Lines, Ltd., 536 F.2d 505 (2d Cir. 1976)).

Nebraska: Dorman v. United States, 268 F.Supp. 249 (D. Neb. 1967).

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New Hampshire: MacLean v. Parkwood, Inc., 247 F.Supp. 188 (D. N.H. 1965), *aff'd,* 354 F.2d 770 (1st Cir. 1966).

New Mexico: Madrid v. Mine Safety Appliance Co., 466 F.2d 856 (10th Cir. 1973).

North Carolina: Spivey v. Babcock & Wilcox Co., 264 N.C. 387, 141 S.E.2d 808 (1965).

Carey v. United States, 183 F.Supp. 727 (M.D.N.C. 1960).

Oklahoma: Hatley v. Mobil Pipe Line Co., 512 P.2d 182 (Okla. 1973).

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Moore v. Sylvania Electric Products, Inc., 454 F.2d 81 (3d Cir. 1972).

Hader v. Coplay Cement Manufacturing Co., 410 Pa. 139, 189 A.2d 271 (1963).

Brletich v. United States Steel Corp., 445 Pa. 525, 285 A.2d 133 (1971).

Crane v. I.T.E. Circuit Breaker Co., 443 Pa. 442, 278 A.2d 362 (1971).

Rhode Island: Molinari v. Sinclair Refining Co., 111 R.I. 490, 304 A.2d 651 (1973).

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Tennessee: Wilson v. Electric Power Board, 544 S.W. 2d 92 (Tenn. 1976).

Utah: Texaco, Inc. v. Pruitt, 396 F.2d 237 (10th Cir. 1968).

Virginia: Atlantic Co. v. Morrisette, 198 Va. 332, 94 S.E.2d 220 (1956).

Washington: Fenimore v. Donald M. Drake Construction Co., 87 Wn.2d 85, 549 P.2d 483 (1976).

APPENDIX II

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Alaska: Deville v. Shell Oil Co., 366 F.2d 123 (9th Cir. 1966).

Hobbs v. Mobil Oil Corp., 445 P.2d 933 (Alaska 1968).

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Mount Dora v. Voorhees, 115 So.2d 586 (Dist. Ct. App. Fla. 1959), *cert. denied,* 119 So.2d 293 (Fla. 1960).

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Missouri: Smith v. The Inter-County Telephone Co., 559 S.W.2d 518 (1977) (en banc).

Montana: West v. Morrison-Knudsen Co., 451 F.2d 493 (9th Cir. 1971).

Wells v. Stanley J. Thill & Associates, Inc., 153 Mont. 28, 452 P.2d 1015 (1969).

Nebraska: Simon v. Omaha Public Power District, 189 Neb. 183, 202 N.W.2d 157 (1972).

Dorman v. United States, 268 F.Supp. 249 (D.Neb. 1967).

Laaker v. Hartman, 186 Neb. 774, 186 N.W.2d 494 (1971).

New Jersey: Donch v. Delta Inspection Services, Inc., 165 N.J. Super. 567, 398 A.2d 925 (1979).

New York: New York law contains a statutory absolute duty to provide a safe place to work to the employees of independent contractors, but when such a provision does not apply, New York follows the rules stated.

Monroe v. New York, 67 App.Div.2d 89, 414 N.Y.S.2d 718 (2d Dept. 1979).

Oklahoma: Hatley v. Mobil Pipe Line Co., 512 P.2d 182 (Okla. 1973).

Pennsylvania: Byrd v. Merwin, 456 Pa. 516, 317 A.2d 20 (1974).

South Dakota: Blumhardt v. Hartung, 283 N.W.2d 229 (S.Dak. 1979).

Texas: Shell Chemical Co. v. Lamb, 493 S.W.2d 742 (Tex. 1973).

Utah: Texaco, Inc. v. Pruitt, 396 F.2d 237 (10th Cir. 1968).

Wisconsin: Snider v. Northern States Power Co., 81 Wis.2d 224, 260 N.W.2d 260 (1977).

APPENDIX III

Restatement (Second) of Torts (1965)

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§ 343A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

§ 388. Chattel Known to be Dangerous for Intended Use

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

§ 409. General Principle

Except as stated in §§ 410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.

§ 410. Contractor's Conduct in Obedience to Employer's Directions

The employer of an independent contractor is subject to the same liability for physical harm caused by an act or omission committed by the contractor pursuant to orders or directions negligently given by the employer, as though the act or omission were that of the employer himself.

§ 411. Negligence in Selection of Contractor

An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

(a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

(b) to perform any duty which the employer owes to third persons.

§ 414. Negligence in Exercising Control Retained by Employer

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject

to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

§ 414A. Duty of Possessor of Land to Prevent Activities and Conditions Dangerous to Those Outside of Land

A possessor of land who has employed or permitted an independent contractor to do work on the land, and knows or has reason to know that the activities of the contractor or conditions created by him involve an unreasonable risk of physical harm to those outside of the land, is subject to liability to them for such harm if he fails to exercise reasonable care to protect them against it.